



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

OFFICE OF
GENERAL COUNSEL

Hon. Michelle Lujan Grisham
Governor of New Mexico
490 Old Santa Fe Trail, Room 400
Santa Fe, NM 87501

JUL 19 2019

Dear Governor Lujan Grisham,

We write in response to Secretary Kenney's July 2, 2019, letter regarding New Mexico's decision to actively pursue judicial enforcement against the United States Department of Defense ("DOD") under state law for PFAS contamination at Cannon and Holloman Air Force bases. The letter also asks EPA to reconsider its position "regarding collaborative federal/state PFAS enforcement under RCRA." It appears that the State is asking EPA to join the judicial action against DOD. While EPA is unable to accommodate that request, the Agency is working to assist the State in a number of ways described below.

As an initial matter, EPA is not permitted to bring a judicial action against another Executive Branch department or agency. This position is consistent with the Department of Justice's long-held view of the unitary executive theory, which is rooted in the President's constitutional authority to see that all laws are faithfully executed. *See* U.S. Const. Art. II; *Myers v. United States*, 272 U.S. 52 (1926). Under our constitutional scheme, that executive power of the United States is exercised in a unitary and uniform way under the President. A dispute between parties in the same branch of government is not justiciable because it does not satisfy the case or controversy requirement of Article III. Therefore, EPA's direct and confidential participation in judicial litigation against DOD would conflict with the unitary and uniform execution of the law.¹

Additionally, the State of New Mexico is authorized to implement the state's hazardous waste program in lieu of the federal RCRA program and is empowered to promulgate, implement, and

¹ Although the Federal Facilities Compliance Act amended the Solid Waste Disposal Act to grant EPA administrative enforcement authority against Federal facilities, it did not authorize civil litigation against Federal government agencies.

enforce its program, including against federal facilities.² EPA's participation in related litigation is not required for the State of New Mexico to proceed against DOD.

Finally, consistent with the Administrator's recent Senate testimony, EPA supports New Mexico's role as a co-regulator and in this capacity is providing technical assistance to the extent that it is able to do so. EPA has committed substantial assistance to New Mexico and other states to help address the challenges PFAS presents. EPA Region 6 staff have been in regular contact with NMED to provide technical and other assistance. By way of example, EPA Region 6 has provided the following PFAS-related technical assistance within the past two years:

2018

- Attended, with NMED, public community meetings, and meetings with affected land owners and farmers
- Attended meetings with NM agencies, the NM Governor's Office, and the Air Force
- Shared information on PFAS (e.g., fact sheets from Vermont on PFAS in dairy products, information on PFAS in a Maine dairy)
- Engaged in planning with NMED to provide PFAS groundwater modeling support and data interpretation, if beneficial

2019

- Provided a PFAS presentation at the Region 6 RCRA All States meeting
- Provided PFAS remediation fact sheets
- Provided a webinar for PFAS emerging characterization and remediation technologies
- Invited the state to participate in a series of joint EPA-State national RCRA PFAS cleanup calls, including related to DOD facilities
- Offered assistance with PFAS groundwater modeling support and PFAS data interpretation

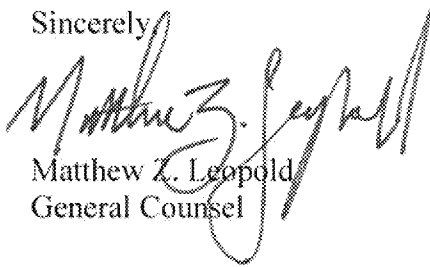
More recently we have had several conversations regarding additional technical support EPA can provide to the State upon request. Also, I know that you also discussed this matter with Doug Benevento who reiterated our willingness and ability to provide additional technical assistance. The Region would be willing to meet with the State RCRA team to discuss what additional support can be provided.

EPA will continue to provide NMED with technical remediation information and other assistance under RCRA and otherwise. While we are not able to assist with the State's litigation against the federal government or with defending litigation brought against the State by DOJ, we will continue to provide NMED with PFAS-related technical assistance, consistent with such

² The assertion in your letter that "NMED is implementing RCRA on behalf of EPA under a primacy agreement" is not fully accurate. Under RCRA section 3006, 42 U.S.C. § 6926(b), a State may be authorized to implement a State's hazardous waste regulatory program "in lieu of" the federal RCRA hazardous waste program. RCRA does not provide for delegation of federal regulatory authority to a State. Therefore, New Mexico is carrying out its hazardous waste program under state law "in lieu of" the federal program; it is not implementing its hazardous waste program "on behalf" of EPA.

assistance to other states. We look forward to continuing our partnership with the State of New Mexico in addressing PFAS.

Sincerely

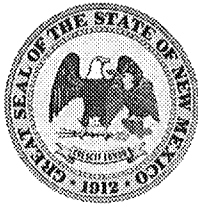
A handwritten signature in black ink, appearing to read "Matthew Z. Leopold".

Matthew Z. Leopold
General Counsel

A handwritten signature in black ink, appearing to read "Peter C. Wright".

Peter C. Wright
Assistant Administrator

CC: James C. Kenney



Michelle Lujan Grisham
Governor

Howie C. Morales
Lieutenant Governor

**NEW MEXICO
ENVIRONMENT DEPARTMENT**

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James C. Kenney
Cabinet Secretary

Jennifer J. Pruett
Deputy Secretary

August 2, 2019

David Gray
Acting Regional Administrator
U.S. Environmental Protection Agency Region 6
1201 Elm Street, Suite 500
Dallas, Texas 75270

RE: U.S. Air Force PFAS Contamination in New Mexico

Dear Mr. Gray,

I am in receipt of the July 19, 2019 letter to Governor Lujan Grisham from the U.S. Environmental Protection Agency's (EPA) Matthew Leopold, General Counsel, and Peter Wright, Assistant Administrator. The EPA states that it is unable to bring a judicial action against another Executive Branch department or agency. EPA concludes that direct and confidential participation in judicial litigation against the Department of Defense (DOD) would conflict with the unitary and uniform execution of law.

The EPA's required legal partnership with the U.S. Department of Justice (DOJ) in litigation is understandable. However, the EPA's reliance on DOJ's Unitary Executive Theory in PFAS litigation against the U.S. Air Force is to the detriment of both the EPA and NMED. It seems logical that if DOJ can represent EPA in Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or Superfund) matters in which it also represents sister federal agencies as Potentially Responsible Parties ("PRPs") the same approach could be applied to RCRA enforcement. Clearly, intra-executive branch judicial enforcement is possible.

Additionally, it is undisputed that EPA is unrestricted from taking administrative enforcement actions against federal agencies under its controlling Acts. Specifically, DOJ's Office of Legal Counsel addressed EPA's authority to enforce Resource Conservation and Recovery Act (RCRA) requirements at federal facilities in its June 14, 2000 opinion titled: *EPA Assessment of Penalties Against Federal Agencies for Violation of the Underground Storage Tank Requirements of the Resource Conservation and Recovery Act*.¹ The memo holds that RCRA Section "6001(b)'s authorization of EPA to bring enforcement actions against federal agencies 'pursuant to the enforcement authorities contained in this [title] . . . in the same manner

¹ See: <https://www.epa.gov/sites/production/files/2015-01/documents/ffustpenalty.pdf>

and under the same circumstances as an action would be initiated against another person' is unmistakably clear in authorizing assessment of those penalties against federal agencies."

In 2014, EPA ordered the U.S. Army to take expedited corrective measures at the former Fort Gillem Army base in Forest Park, Georgia at the cost of \$1,003,825. Activities at the base resulted in soil, sediment, surface water, and groundwater contamination. The EPA's compliance order required the U.S. Army to determine the level of risk posed by contaminants to the residents and property owners surrounding Fort Gillem and mitigate any unacceptable risk to those persons. Further, the compliance order required the U.S. Army to identify and test all private drinking water wells and springs in the area, evaluate whether the wells or springs were contaminated, and take all appropriate actions to expeditiously mitigate any unacceptable risks to persons using such wells or springs. This is just one of 314 formal administrative cases the EPA initiated and settled against Executive Branch agencies and departments under RCRA authority according to EPA's Enforcement and Compliance History Online (ECHO) database.

With respect to technical support of our litigation, I appreciate your willingness to assist NMED with groundwater modeling support. Undoubtedly, such technical assistance will benefit our litigation provided such discussions and work products are confidential – meaning EPA refrains from sharing such information with DOJ and the U.S. Air Force. As we previously discussed, NMED would like to enter into a formal agreement to protect NMED's litigation interests.

The residents and local industries impacted by PFAS contamination around Cannon and Holloman Air Force Bases expect clean and safe water. That outcome is best delivered when the EPA and State are true collaborative partners in environmental enforcement. With or without EPA's support, I am committed to ensuring that New Mexico maintains a robust RCRA program for the protection of the citizens of New Mexico.

Should you have any questions about this letter, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read 'James C. Kenney', with a large, stylized flourish extending to the right.

James C. Kenney
Cabinet Secretary

New Mexico Environment Department

cc: Matthew J. Leopold, EPA General Counsel
Peter Wright, EPA Assistant Administrator
Jennifer Hower, NMED General Counsel



State of New Mexico

Michelle Lujan Grisham
Governor

August 2, 2019

Andrew R. Wheeler
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

RE: U.S. Air Force PFAS Contamination in New Mexico

Dear Administrator Wheeler,

I am in receipt of a letter dated July 19, 2019 affirming your agency's decision to not assist New Mexico in holding the U.S. Air Force accountable for violating federal and state law related to PFAS contamination of our land and water. The U.S. Environmental Protection Agency's (EPA) decision to not do everything under its current enforcement authorities – whether judicial or administrative – is inconsistent with its mission to protect public health and the environment. Further, it is a demonstrative example of EPA's failure to uphold compliance with federal environmental laws.

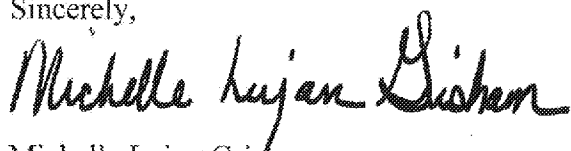
On March 5, 2019, the New Mexico Environment Department (NMED) under the leadership of Secretary James Kenney, initiated a legal action against the U.S. Air Force for violating the State's Hazardous Waste Act. Also, on March 5, 2019, Secretary Kenney sent the U.S. Air Force a letter providing notice that the State of New Mexico intended to pursue claims under the federal Resource Conservation and Recovery Act (RCRA) following the requisite 90-day notice period. You and then Regional Administrator, Anne Idsal, were also sent this letter. On July 24, 2019, a preliminary injunction and amended complaint to include federal RCRA claims were filed in District Court.

Further, you personally committed to Senator Tom Udall on April 3, 2019 during the Senate Appropriations hearing to assist NMED with legal and technical assistance in a confidential manner. None of the activities listed in the July 19, 2019 letter from your General Counsel and Assistant Administrator directly fulfill your commitment to support NMED in a legal or technical manner. Providing factsheets and offering webinars are not meaningful legal and technical assistance in pursuit of state and federal claims that would compel the U.S. Air Force to take responsibility for delineating the PFAS plume, remediating it and protecting our communities.

I stand by Secretary Kenney's assertion in the enclosed letter to Acting EPA Regional Administrator David Gray that a better outcome for environmental enforcement is when EPA is a true collaborative partner. Secretary Kenney is committed to ensuring that New Mexico maintains a robust RCRA program for the citizens of New Mexico pursuant to federal law and primacy agreements with EPA. In turn, I expect EPA will reciprocate by providing any and all necessary support to NMED regarding RCRA enforcement and this specific matter.

I look forward to you fulfilling your commitment to New Mexicans.

Sincerely,

A handwritten signature in black ink that reads "Michelle Lujan Grisham". The signature is fluid and cursive, with the first name "Michelle" being the most prominent.

Michelle Lujan Grisham
Governor
State of New Mexico

Enclosure

Cc: The Honorable Tom Udall
The Honorable Martin Heinrich
The Honorable Ben Ray Lujan
The Honorable Debra Haaland
The Honorable Xochitl Torres Small
James C. Kenney, Cabinet Secretary, New Mexico Environment Department



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1201 ELM STREET, SUITE 500
DALLAS, TEXAS 75270 – 2002

Office of the Regional Administrator

August 6, 2019

Hon. Michelle Lujan Grisham
Governor of New Mexico
490 Old Santa Fe Trail, Room 400
Santa Fe, NM 87501

James C. Kenney
Cabinet Secretary
1190 Saint Frances Drive, PO Box 5469
Santa Fe, NM 87505

Governor Lujan Grisham and Secretary Kenney,

This responds to your letter to Administrator Wheeler, dated August 2, 2019, criticizing the level of assistance EPA has provided to the State of New Mexico regarding PFAS contamination near Cannon and Holloman Air Force Bases. As the Regional Administrator for EPA Region 6, I am responding on behalf of the Administrator.

Since PFAS contamination was discovered in New Mexico, we have worked with the State to provide technical and other expert assistance to provide for the protection of public health and the environment. Our efforts to address PFAS have been in partnership with the State of New Mexico and its career professionals who have worked with us to ensure that we are operating using science that is credible and would withstand scrutiny. In fact, later this week technical teams from EPA and the State are scheduled to meet to continue our important work. This is a crucial next step in our progress to address PFAS contamination in New Mexico and formulate our shared approach to addressing it.

If the State has not found our assistance useful, that has not been communicated as we have worked jointly on this issue. In fact, we are currently working with the New Mexico Environment Department (NMED) to further evaluate site conditions, identify data gaps, and perform modeling in areas where we believe there is contamination. It was our understanding that NMED supports these activities and believes these steps will provide valuable information to the State as well as to its citizens potentially impacted by PFAS. While we understand New Mexico is engaged in litigation, the work that we jointly agreed would be useful in addressing this matter should not be disparaged.

At EPA, we continue to remain focused on helping the State by providing technical assistance, as well as scientific expertise to protect human health and the environment. It is important that public officials not allow short-term litigation posturing to interfere with those goals, as it has the potential to miscommunicate to the public the truth of the federal-state collaboration. For many years the citizens of New Mexico have benefited from our cooperation and we look forward to continuing our shared success.

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It is my hope that your letter does not indicate an intent that the State is no longer interested in the exchange of technical information and cooperation. New Mexico has always indicated that such exchanges were welcome and useful, and EPA is eager to continue to provide that assistance.

Sincerely,

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Ken McQueen
Regional Administrator